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IN THE

# Supreme Court of the United States

**No. 222**

**October Term, 1969**

JACK G. BUNCHER, d/b/a
THE BUNCHER COMPANY,

*Petitioner,*

v.

THE NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## REPLY BRIEF FOR JACK G. BUNCHER, d/b/a THE BUNCHER COMPANY

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## REPLY BRIEF FOR JACK G. BUNCHER, d/b/a THE BUNCHER COMPANY

This Reply Brief is filed in accordance with the provisions of Rule 24(4) of the revised Rules of the Supreme Court of the United States to respond to two assertions advanced by the National Labor Relations Board in its Brief In Opposition. Although these are important matters for the consideration of the Court we will deal with them as briefly as possible.

1. The Board attempts to cloud one of the principal issues in this case by arguing that Buncher does not con-

test that it must bear the burden of proving that certain employees are not entitled to backpay in this case because they would have been laid off, in the normal course of events, even in the absence of discrimination. The Board's argument entirely misses the point and serves only to obscure an important issue in the case.

The point is that the ground rules for the backpay proceeding, established by the prior decisions of the Board and the Court of Appeals, were completely ignored by the Board in developing the backpay specification upon which the Board and Court Orders in the instant case are based.

In the original unfair labor practice case both the Trial Examiner and the Board found that there existed, at the time of the discriminatory discharges, economic justification for a reduction in force under normal business practices and that some of the discriminatees might have been laid off in a subsequent reduction in force.[1]

The Court of Appeals took special note of this part of the Board's Order in its decision on the Board's Petition for Enforcement of the Order.[2]

On this basis the ground rules for the backpay proceeding were established. The purpose of the hearing was to discover which of the discriminatees would have been selected for layoff absent unfair labor practices in the admittedly economic reduction in force.[3] The test, in this proceeding, was to be "such system of seniority or other non-discriminatory practice *heretofore applied by the Respondent* in the conduct of his business" (emphasis supplied).[4]

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[1] *The Buncher Company*, 131 NLRB 1444, 1445, 1456-1457 (1961).

[2] *N. L. R. B. v. The Buncher Company*, 316 F. 2d 928, 929 (3rd Cir. 1963)

[3] *The Buncher Company, supra*, 131 NLRB 1444, 1445.

[4] *Id.*, at 1445.

As Trial Examiner Rosenberg noted in his Supplemental Decision (App. G, p. 85b, n. 14), General Counsel conceded that Buncher had no seniority system. The Trial Examiner also found (App. G, p. 85b, n. 17) that General Counsel made only one attempt to show use of seniority. To quote the Trial Examiner, "This attempt proved abortive"—it actually disproved use of seniority by Buncher. He also found that the Board and the Court had adopted Trial Examiner Bott's prior finding to this effect and that this was the law of the case (App. G., p. 85b).

In spite of these undisputed facts, the Regional Director used what he called "seniority" as the sole basis in determining who would have been laid off or retained. The backpay specification paid no attention to the non-discriminatory criteria ordinarily applied by Buncher in the conduct of his business.

This is directly contrary to the ground rules set up by the Board, pursuant to which the backpay proceeding was held, that the determination should be made using non-discriminatory criteria "heretofore applied by the Respondent".

Thus, the Board's argument concerning the burden of proof only tends to obscure the fundamental infirmity of the backpay specification upon which the Board and Court Orders in this case are based.

2. The Board argues that Buncher "conceded that each of the discriminatees was competent" and that the record demonstrates that each was qualified in one of the Company's three major work classifications. From this the Board argues that it was "reasonable . . . to assume" that appropriate work was available for a discriminatee at any one of the Company's three locations where employees

performed work in these classifications (Brief In Opposition, p. 9).

The Board unfairly characterizes Buncher's testimony regarding the ability of the discriminatees saying that he conceded that each of them was competent (Brief In Opposition, p. 9). What he said was:

> "Q. If you were going to hire anybody back it would have been [799] logical to hire them back?
>
> "A. If I were going to hire somebody back *and I knew I had a job of just shovel operator and running a shovel day in and day out*, something like that, I would like to—I would say certainly I would." (Joint App. 702a) (emphasis supplied).

This certainly did not mean that if he had a job as barge man, steel erection man, or any of the variety of jobs other than running a shovel that he would call the shovel operator in to do these jobs. The slag operation, where all the discriminatees were employed, due partly to increased efficiency and partly to reduced work, went from a total of 34 men on January 14, 1960 (Joint App. 846a); down to 23 men on March 10, 1960 (Joint App. 847a); to 15 men on June 30, 1960 (Joint App. 851a); to 17 men on May 18, 1961 (Joint App. 853a).

The fact that a man was a competent shovel operator and that Buncher had nothing against him or his work as a shovel operator certainly does not mean that Buncher would have or should have retained him when there was no shovel to operate, applying non-discriminatory tests.

*The Board has not attacked Buncher's decision as to the number and identity of jobs to be filled, at least subsequent to May 12, 1960.* The jobs that were filled are thus known. The job descriptions for each were not controverted. The record is thus in a posture to permit analysis

of each individual employee laid off or retained on the basis of the jobs actually filled.

Reference to this record, which painstakingly reviews the employment history, experience and capability of every man and every job at every location, applying the non-discriminatory factors normally applied by employers, and by Buncher, will demonstrate that we produced testimony and evidence to support our conclusion that the discriminatees would have been laid off.

Buncher was entitled to have the Trial Examiner and the Board make a decision, applying these tests, as to each discriminatee. Instead, the Board advanced only general arguments as to why an employer can never use such tests, and general statements that none of Respondent's testimony, evidence or witnesses (except the parts the Board uses) are credible.

Of course, Counsel for the Board now attempts a fragmentary analysis in his brief, but it is the Board and not Counsel that has this responsibility. As Mr. Justice Goldberg said in *N. L. R. B. v. Metropolitan Life Insurance Co.*, 380 U. S. 438 (1965):

> "* * * Although Board counsel in his brief and argument before this Court, has rationalized the different unit determination in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administration process requires that '*courts may not accept appellate counsel's post hoc rationalizations for agency action* . . . . . *.*' " (emphasis supplied).

For these reasons, as well as those stated in our Petition, we assert that what the Board applied was not a "system of seniority," but an arbitrary, illogical and unreasonable mathematical formula.

Buncher was entitled to an unbiased, thorough analysis of all the non-discriminatory factors ordinarily used for each and every man on the basis of the whole record. Unless and until he gets that, he has not received the fair and impartial treatment guaranteed everyone under the law.

Respectfully submitted,

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